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IN THE

Supreme Court of the United States

October Term, 1968, No. 1094

WILLIAM L. BORCHERT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Ninth Circuit

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TOPICAL INDEX

Page

Citation to Opinion below 2

Jurisdiction 2

Questions presented for review 2

Constitutional provisions involved 2

Fifth Amendment 2

Sixth Amendment 3

Statement of the case 3

Reasons for granting the Writ 11

I

The decision of the Court of Appeals for the Ninth Circuit did not sufficiently take into account all proceedings against Petitioner from time of arrest to time of conviction, in the context of which proceedings Petitioner claims he did not receive a fair trial, with particular reference to line proceedings 11

II

The Court below did not sufficiently deal with Petitioner's contention that the presentation of evidence and testimony on behalf of Petitioner at trial was so inadequate as to constitute denial of a fair trial and effective counsel 23

Conclusion 27

APPENDIX

Opinion of the United States Court of Appeals for the Ninth Circuit, Case No. 22,381, December 31, 1968 1

TABLE OF AUTHORITIES CITED

Cases	Page
Gilbert vs. State of California, 388 U.S. 262, 87 S.Ct. 1951 (1967)	11, 18, 20, 22, 23
People vs. Caruso, 68 A.C. 181, 65 Cal.Rptr. 336, 436 P.2d 336 (1968)	19
People vs. Welborn, 257 C.A.2d 513, 65 Cal.Rptr. 8 (1968)	24
Stovall vs. Denno, 338 U.S. 293, 87 S.Ct. 1967 (1967)	11, 12, 18, 19, 22, 23
United States vs. Meyers, 381 Fed.2d 814 (1967)	11, 18, 19
United States vs. Wade, 388 U.S. 218, 87 S.Ct. 1926 (1967)	11, 12, 13, 14, 15,16, 17, 18, 20, 22, 23
Wise vs. United States, 383 F.2d 206 (1967)	19

Constitution	
United States Constitution	21
Fifth Amendment	2, 19
Sixth Amendment	2, 3, 18

Statutes	
United States Code	
Title 18, Section 2113a	1
Title 28, Section 1254(1)	2
United States Code Annotated	
Anno., Constitution of the United States, Amendments 1 to 5, Amendments 6 to 14	3

Texts	
24 American Law Review, page 1025, annotation	24
64 American Law Review, page 436, annotation	24

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Petitioner, WILLIAM L. BORCHERT, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the Decision of said Court of Appeals filed in the above-entitled case on December 31, 1968. On September 11, 1967 the United States District Court, Central District of California, Honorable Irving Hill, Judge presiding, entered its judgment of conviction (Clk Tr. 61) of petitioner for violation of Title 18, United States Code, Section 2113a (Clk. Tr. 3). Said judgment of conviction was affirmed on appeal by the Decision of the United States Court of Appeals filed December 31, 1967. On January 31, 1969 this court, by Honorable William J. Brennan, Jr., Associate Justice, issued its order extending time for filing Petition for Writ of Certiorari herein to and including March 1, 1969.

CITATION TO OPINION BELOW

The Opinion filed December 31, 1968 by the United States Court of Appeals for the Ninth Circuit is as yet unreported. A copy of said Opinion is attached to this Petition as the Appendix.

JURISDICTION

Jurisdiction of the Court to review the judgment of the Court of Appeals is conferred by Title 28 U.S.C., Section 1254 (1) upon questions arising under the Fifth and Sixth Amendments to the United States Constitution.

QUESTIONS PRESENTED FOR REVIEW

I

In the totality of the circumstances surrounding petitioner's trial and conviction, was he deprived of a fair trial within the meaning of due process of law?

II

Was the presentation of evidence and testimony on behalf of petitioner at trial sufficiently adequate to constitute a fair trial within the meaning of due process of law?

CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the Constitution of the United States are involved:

Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a present-

ment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

(U.S.C.A. Anno., Constitution of the United States, Amendments 1 to 5, Amendments 6 to 14)

STATEMENT OF THE CASE

References in brackets herein are to the Reporter's Transcript unless otherwise noted as Clerk's Transcript.

On March 15, 1967 petitioner, employed as a liquor salesman, had occasion to be in the area of La Canada

Branch of the Bank of America, 651 Foothill Boulevard, La Canada, California (the bank) (139, 159).

At about 2:40 p.m. that day the bank was robbed of $954.00 (80-84).

At approximately 6:52 p.m., the same date, petitioner was arrested as he arrived at his home in Huntington Beach, California after working his route for several miles east to his last stop at Fontana, California (130-132).

At some time after arrest and long before line-up, petitioner was orally advised of his constitutional rights, and signed a written waiver of such rights at 7:30 p.m. (132-135).

At the time of his arrest and throughout the day in question, petitioner was driving a 1965 white Comet, California License No. NGE 890 (131, 136).

On questioning by the arresting officers at the Huntington Beach Police Department, petitioner denied involvement in the robbery and accounted for his activities on the day in question, during all of which only he had driven the 1965 white Comet. Included in his activities, as stated by him to the officers on being questioned, was a stop at the Bank for the purpose of making telephone change from a five dollar bill so as to make telephone calls along his sales route (137). He also told the arresting officers he performed paperwork while parked outside the bank, before going in to get the change (137).

At the time of the arrest one of the arresting officers searched the trunk of petitioner's vehicle and found $86.00 in one dollar bills in the left tire well and $209.00

in currency in a golf bag located therein (155). Petitioner volunteered to the questioning officers on his arrest that he had approximately $150.00 in a golf bag cover in the trunk of his car, but did not know where any other money would have come from (138-139).

At trial the arresting officers testified to the foregoing circumstances surrounding the arrest and the statements attributed to petitioner.

Bank personnel testified by way of identification of petitioner. The bank was located at the northwest corner of Oakwood Street and Foothill Boulevard in La Canada (7).

Two of the bank personnel, witness Jones and witness Hastie, identified petitioner as observed seated in a white car License No. NGE 890 parked outside the bank, for some fifty minutes prior to the robbery; stated that he was taking his glasses off and on and appeared to be working on some papers; and further that he drove away from the point where he was parked and returned to the same spot on more than one occasion (6-18).

Witness Jones identified petitioner as a man who later came in the front door of the bank and went to the window of witness Hastie, then departed to return fifteen to twenty minutes later, at which time he held up witness Canada, a teller (21-23).

Witness Hastie testified that after she had observed petitioner parked in his car outside the bank, he came to her teller window inside the bank and asked for and received change for a twenty dollar bill, whereupon he departed through the front door (52-54); that approxi-

mately ten minutes later she saw petitioner come back into the bank, go to the window of teller Maria Canada, then depart by way of the rear door (55-57).

Witness Canada identified petitioner as the person who held her up at about 2:40 p.m., after placing a brief case on the counter in front of her teller window, and that he then departed by way of the back door of the bank (80-87). This identification was confirmed by the testimony of witness Corey (97-99).

Other bank personnel identified petitioner as leaving the bank at about the time of the robbery by way of the back door, getting into a white Comet and then driving away (111-117, 122-124).

Cross-examination of the prosecution witness for the most part was brief and of the nature of a recapitulation of the testimony given on direct examination. No testimony was elicited from either prosecution or defense witnesses concerning the placing of petitioner in a lineup for purposes of identification, after his arrest.

On his own behalf, petitioner testified that on March 15, 1967 he drove his 1967 Comet from his office for the purpose of calling upon accounts in the Glendale area and that he then proceeded to the following places for the same purpose: Oakmont Country Club, Montrose Vons Grocery, La Canada Country Club, Sparr Restaurant on Foothill Boulevard near the bank, where he had lunch; then at 1:30 to 2:00 p.m. to Vons Grocery across the street from such restaurant; thereafter he parked outside the bank facing north on Oakwood Street above Foothill; there he sat in his car, posted sales in his route book and

outlined his route for the balance of the day; he had been in the bank several times before as a place of convenience on his sales route for the purpose of making interbank deposits and getting change; prior to March 15, he had seen some of the bank personnel who had testified against him and had spoken to the witness Kieffer, a bank employee; he went into the bank by the front entrance and got telephone change for a five dollar bill; he drove north on Oakwood and returned to Foothill Boulevard where he phoned his office from a service station; he got into his car and proceeded west on Foothill to a point in front of the bank where he made a U-turn so as to go east on Foothill; he then completed his business calls for the balance of the day, going to West Covina, Glendora, Fontana and Upland; he then telephoned his wife in Huntington Beach who advised the police who were looking for him; he arrived home at about 7:00 p.m.; after his arrest and questioning he told police he had between $150.00 and $200.00 in his golf bag in the car, which he was saving for his 25th wedding anniversary; he did not return to the bank after cashing his five dollars; he did not wear a hat or carry an attache case, as testified by prosecution witnesses at the time he was allegedly committing the robbery (all of the foregoing, 159-178); the sales book he was working on while seated in his car outside the bank had been taken by the Federal Bureau of Investigation and later returned to him and the results of his work for the afternoon of March 15, 1967 are recorded in that book (174); the last time, prior to March 15, he had been in the bank was from one week to ten days to two weeks (182, 223).

Petitioner's wife was called briefly on his behalf to confirm that prior to his return to their home on March 15, he telephoned her, and she advised him that the police had been there looking for him (195-197). The only other witnesses called on behalf of petitioner were character witnesses.

In rebuttal the United States attorney produced evidence of a palm print on the counter at witness Canada's teller window, which palm print the expert believed to be that of petitioner (212-214).

In addition to the foregoing, as shown by the affidavit and supplemental affidavit of petitioner (Clk. Tr. 30, 39), the following facts appear:

After questioning by the arresting officers on March 15, 1967 at the Huntington Beach Police Department petitioner was transported to the Lakewood office of the Los Angeles County Sheriff's Department and thereafter to the Los Angeles County Jail, where he removed his civilian clothing and put on jail clothing provided him. Petitioner was then placed in a lineup with three other men, each of whom wore a white band on his wrist of the type worn by jail inmates. Petitioner did not wear such a band. The three other men who were in the lineup were of a different height, stature and complexion, and petitioner estimated a ten year difference in their ages and his. At the request of officers, he repeated certain statements, in substance: "Be quiet. Go to the vault and get me the money." Petitioner was also asked to place glasses on his face, as were the other persons in the lineup. When initially arrested, petitioner was informed of constitutional rights respecting the right to counsel and that

he may remain silent; but at the time of being placed in the lineup, which had to be some hours later, no one informed him he had a right to have counsel present at such a procedure. Had petitioner known he had the right to have an attorney present at the lineup, he would have requested counsel (Clk. Tr. 30-32).

On March 17, 1967, two days after his arrest, petitioner dictated and had transcribed all the facts as he knew them surrounding his activities and conduct on the day of the alleged offense. This document detailed persons with whom he was in contact on said day and charted his activities of that day in order to establish that the arrest and identification of petitioner as the robber of the bank was a matter of mistaken identification. Said document was given to counsel who represented petitioner at trial, and petitioner suggested the persons referred to therein be called as witnesses on his behalf for the purpose of establishing his pattern of activities on the day of the robbery, and his condition, attitude and emotional state both before and after the robbery. One of said witnesses would have testified to the effect that petitioner had a severe limp and was wearing a soft shoe on his left foot because of a sore condition of the foot (Clk. Tr. 39-48).

After his original consultation with trial counsel, petitioner, other than a final conference the Friday before trial, consulted said counsel on two occasions, each lasting fifteen to thirty minutes and spoke again of calling the mentioned witnesses on his behalf. In addition, petitioner spoke of testimony to establish his background and position, the fact that he had earned in excess of $15,000.00 per year for three years working for his employer, and

that he would earn considerably in excess of such figure in 1967 (Clk. Tr. 39-48).

At least eight persons, as indicated in said memorandum given to counsel, could have been called to establish the general pattern of petitioner's activities on Wednesdays of every week and the facts and circumstances as they knew them on the particular Wednesday of March 15, 1967. Said testimony and evidence would have gone to the issue of motivation, whether petitioner was likely to have committed the offense charged; to the issue of mistaken identification; and to show that in connection with his business activities, he was often near and in the bank which was robbed. Petitioner's route notebook with entries and notations showing the reason for his being in the area of the bank and the various places of business visited by him on March 15, 1967 was available but was not put into evidence. Petitioner was surprised when the witnesses and evidence herein referred to were not produced at trial and that no issue was made at trial of the previous identification of himself at the lineup as the person who had committed the robbery (Clk. Tr. 39-48).

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT DID NOT SUFFICIENTLY TAKE INTO ACCOUNT ALL PROCEEDINGS AGAINST PETITIONER FROM TIME OF ARREST TO TIME OF CONVICTION, IN THE CONTEXT OF WHICH PROCEEDINGS PETITIONER CLAIMS HE DID NOT RECEIVE A FAIR TRIAL, WITH PARTICULAR REFERENCE TO LINEUP PROCEEDINGS.

In his appeal petitioner contended that in the entire context of the proceedings against him, with particular reference to a line-up to which he was subjected, he did not receive a fair trial, and that this conclusion follows from careful examination of principles of law enunciated in *United States vs. Wade*, 388 U.S. 218, 87 S. Ct. 1926 (1967); *Gilbert vs. State of California*, 388 U.S. 262, 87 Supreme Ct. 1951 (1967); *Stovall vs. Denno*, 388 U.S. 293, 87 Supreme Ct. 1967 (1967); and *United States vs. Meyers*, 381 Fed.2d 814 (1967).

It must be noted that in each of the three Supreme Court cases above mentioned, in addition to the in-court identifications made of the defendant, the witnesses admitted to line-up identification, in contrast to the situation at hand where the line-up identification was not brought out at trial. Nevertheless, petitioner contends that the reasoning of the Court makes the principles of these three cases applicable in the case at bar.

In summary, the applicable principles are:

1. The line-up procedure is indeed a critical point in the criminal proceedings, one where the die of defendant's guilt may be so cast as to make the trial a formality. This is clear from the language of the Court in *Wade* at page 224 where, after discussing the case, the court went on to say that, "In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings". At page 298 of *Stovall* the Court further concluded that the confrontation is a "critical stage" and that counsel is required at all confrontations.

2. The very procedure is one fraught with the possibility of abuse unless governing rules of fairness are observed.

It will be recalled that the Court in *Wade* said further at page 228:

> "But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially derogate from a fair trial. The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted?' ".

3. By the very hypothesis, a defendant is entitled to have an attorney present as such proceedings unless he has *intelligently* waived such right (*Wade*, p. 237).

4. The testimony of identifying witnesses at trial may not be tainted with violation of such constitutional right of the accused (*Wade*, pp. 238-240).

5. The right to cross-examination of such witnesses as to whether their identification at trial was formed independent of a line-up procedure is part and parcel of the concept of fair trial (*Wade*, pp. 239-241).

To quote further from *Wade* at page 227:

> "In sum, the principle of Powell v. Alabama and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice."

In his appeal petitioner acknowledged that in the case at bar the prosecution, as it need not have, did not examine the identifying witnesses upon the matter of previous line-up identifications, nor did counsel for petitioner make such inquiry upon cross-examination.

In support of his motion for new trial petitioner submitted his affidavit and supplemental affidavit wherein were set forth the aforementioned facts and circumstances surrounding a lineup where he was presumably exposed for identification to persons who claimed to have

observed the robbery (Clk-Tr. 30, 39). Petitioner contends the lineup procedures employed could not meet the criteria mentioned in *United States v. Wade*. There the Court mentioned such disqualifying factors as: placing only a few persons in the lineup with the accused; the marked dissimilarity in appearance between the suspect and the others; and the impermissibility of using words allegedly used during a criminal act (pp. 233, 236-237).

Here only three other persons appeared with petitioner. The physical differences between petitioner and these three were such as to make the exposure individious to the point of being obvious. Petitioner wore no jail identification bracelet; the others did. His physical characteristics and age were grossly dissimilar to theirs. He wore on one foot a regular walking shoe and on the other a soft, white shoe (because of a lame foot).

Thus, the situation at lineup was, to begin with, fraught with the very dangers to an accused which the Court dwelt upon at length in *Wade*. In the circumstances, it is submitted, the Court must closely scrutinize both the question of whether appellant had intelligently waived his right to counsel (standing alone as he was against the state at a stage of the prosecution — formal or informal, in court or out — where counsel's absence might derogate from his right to a fair trial, *United States v. Wade, supra*, p. 226), and whether absent exposure at trial of the facts surrounding lineup identification it can be said he received a fair trial within the concept of constitutional guarantees.

As in *Wade*, on the record before the Court the questions are difficult to resolve. But, as there, the Court can

grant relief, following its suggestions in that case (p. 242):

> "On the record now before us we cannot make the determination whether the in-court identifications had an independent origin. This was not an issue at trial, although there is some evidence relevant to a determination. That inquiry is most properly made in the District Court. We therefore think the appropriate procedure to be followed is to vacate the conviction pending a hearing to determine whether the in-court identifications had an independent source, or whether, in any event, the introduction of the evidence was harmless error."

Testimony was adduced at trial to the effect that petitioner was initially advised of his constitutional rights, including the right to counsel. He even signed a statement acknowledging such advice. But the question here must be whether such advice, given at one critical and early stage of the criminal proceedings (at a time when petitioner was obviously in shock and fright) suffices in relation to a stage later in time, one which does not obviously come within the ambient of meaning of the original advice; and in turn this factor must be considered in relation to the question whether in the total circumstances petitioner received a fair trial.

It is submitted that the Court's comments in *Wade* on the particularly significant and emotional procedure of lineup puts the answer in doubt (pp. 230-231):

> "Improper influences may go undetected by a suspect, guilty or not, who experiences the emo-

> tional tension which we might expect in one being confronted with potential accusers."

Petitioner not having had the benefit of counsel at the lineup, counsel at trial was surely in the classic dilemma mentioned by the Court in *Wade* at pp. 240-241, on account of which it may be well said of petitioner that he has suffered the consequences of that dilemma. There it was said:

> "The State may then rest upon the witnesses' unequivocal courtroom identification, and not mention the pretrial identification as part of the State's case at trial. Counsel is then in the predicament in which Wade's counsel found himself — realizing that possible unfairness at the line-up may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark in an attempt to discover the reveal unfairness, while bolstering the government witness courtroom identification by bringing out and dwelling upon his prior identification. Since counsel's presence at the line-up would equip him to attack not only the line-up identification but the courtroom identification as well, limiting the impact of violation of the right to counsel to exclusion of evidence only of identification at the line-up itself disregards a critical element of that right."

The Court further pointed out at page 242 that from the record it was impossible to determine whether the in-court identifications had an independent origin. The Court indicated that inquiry should be made in the District Court, and stated specifically at page 242:

> "We therefore think the appropriate procedure to be followed is to vacate the conviction pending a hearing to determine whether the in-court identifications had an independent source, or whether, in any event, the introduction of the evidence was harmless error."

It was said too that no hard and set rule can be made regarding exclusion of courtroom identification by reason of the absence of counsel at lineup. Rather, it was pointed out that the Government should be given the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than at the lineup (p. 240). The rules as laid down in *Wade* were not yet available at the time of petitioner's trial so as to have guided the trial court respecting the admissibility of courtroom identifications.

In any event, petitioner's own statement in his affidavits that he *did not* realize his rights include the presence of counsel at the lineup stage clearly shows any claimed waiver of such rights could not have been *intelligently* made, as required.

As already pointed out, in the case at hand this lack may only relate to the most basic issue of all — whether the whole fabric of the proceedings can be fashioned into the cloak of fair trial guaranteed to the defendant. *Wade* requires that the court scrutinize any pretrial confrontation of the accused to determine whether presence of counsel was necessary to preserve his right to fair trial as affected by his right *meaningfully* to cross-examination of witnesses against him. Security of the right to fair trial was said by this Court to be as much the aim of right

to counsel as it is of the other guarantees of the Sixth Amendment.

Petitioner submits that the Court now has before it not merely the pat, almost glib, unchallenged identification of defendant as made by the prosecution witnesses at trial. Rather, it may now consider *all* the facts surrounding the arrest and detention, including the critical stage of the lineup identification, as shown by the affidavits submitted by petitioner. The resultant duty of any court, it is submitted, is to apply the test of fair trial within this context. This should be done bearing in mind the fact that petitioner's only defense to the charge, one which he anticipated presenting through the testimony of numerous witnesses and himself, was that he had been mistakenly identified as the robber. Part and parcel of a fair trial would be meaningful cross-examination of identifying witnesses as mentioned by the Court in *Wade* (p. 227, above quoted), which could never be achieved if in fact his constitutional rights were violated as claimed.

Thus, the Court is in a position on review to rectify petitioner's situation, to make certain by directing a new trial that all his rights have been preserved — his right to counsel at a critical stage of the proceedings, to be deemed abandoned only upon intelligent waiver, and his right, in the light of all circumstances, to a fair trial where *all* defenses and issues are heard.

While it is true that in *Stovall* the Court applied *Wade* and *Gilbert* only prospectively, i.e. as to those lineups held subsequent to June 12, 1967, the case of *United States v. Meyers*, 381 F.2d 814 (1967) recognized this point but went on to say of the doctrine:

> "Relator is not precluded, however, from inquiring into the 'totality of the circumstances' surrounding the line-ups in order to determine whether the procedures were so unfair as to deprive him of a fair trial. *Stovall v. Denno*, supra at 302, 87 Supreme Ct. 1951, and see *Palmer v. Payton*, 359 Fed.2d 199 (4 Cir. 1966), cited with approval in *Stovall* at 302 of 387 U.S., 87, S. Ct. 1967." (pp. 816-817)

This concept of fairness, i.e. apart from the sole question of the right to counsel at lineup, was applied by the Court of Appeals for the District of Columbia Circuit in a case where identification was made only minutes after apprehension. While refusing to find the circumstances of the confrontation so unfair as to require exclusion of testimony thereof under *Stovall* and the due process clause of the Fifth Amendment, because of the circumstances of fresh identification, the court said:

> "It may be that in a particular case there would be reason, without denying the general principle of prompt identifications, to say that the particular identification was conducted in such an unfair way that it cannot tolerably be admitted into evidence." *Wise v. United States*, 383 F.2d 206, 210 (1967).

Again, in a recent decision of the Supreme Court of California, this rule was applied where the identification had taken place prior to June 12, 1967: *People v. Caruso*, 68 A.C. 181, 65 Cal.Rptr. 336, 436 P.2d 336 (1968). The facts of the case before the court were similar to those at hand. A store was robbed at about 12:45 p.m. At about mid-morning one of the employees, who was

later one of the two persons actually robbed, had observed the defendant in a car parked on the store parking lot. Other witnesses had observed the defendant in the area at later time of day. Defendant was arrested on the night of the robbery and the next morning was placed in a lineup with four other men, and the testimony of both witnesses for the defense and prosecution established that the other lineup participants did not physically resemble the defendant in important respects.

The two victims identified defendant as the driver of the robbery car. One of them further identified defendant as the man in the store parking lot who had briefly attracted his notice earlier that morning. Other witnesses placed defendant in the vicinity of the store at a time later in the day. The two victim witnesses were questioned as to circumstances surrounding the identification of the defendant at the lineup the morning after the arrest.

The California court took note that under Stovall the rule of *Wade* and *Gilbert* is to be given only prospective application. However, the court went on to hold that the lineup resulted in such unfairness that it infringed upon defendant's right to due process of law, since the lineup was unnecessarily suggestive and conductive to irreparable mistaken identification. The court specifically held that the line-up's grossly unfair make up deprived defendant of due process of law (pp. 339, 340). The court took note of other circumstances lending credence to the defense, such as the fact that a police search of the defendant's home failed to reveal either the automatic pistol or the missing receipts, that no motive for the offense

was ever established, that defendant was steadily employed at satisfactory wage and maintained a good reputation at work, and was married with children.

Thus in the totality of the circumstances surrounding the trial and conviction of petitioner, it may be said at the very least that it does not *clearly* appear that he received a fair trial under the concept of due process of law.

The question presented to the Court is whether circumstances surrounding all the proceedings against petitioner from arrest to line-up to conviction are to be confined to those found in the transcript of the trial. Here petitioner made his motion for new trial bringing forth in the form of uncontested affidavits facts concerning his arrest and submission to line-up, and the retaining of counsel to represent him at trial. All the facts taken together raise specific questions as to the propriety of line-up procedures and presentation of evidence on his behalf at trial. The total question becomes whether he was fairly tried in the context of all facts and procedures presented.

In its opinion, the Court of Appeals for the Ninth Circuit asserts, (Appendix, p. 5):

> "The trial record clearly shows that in the entire context of the proceedings against appellant, with particular reference to the lineup to which he was subjected, he did receive a fair trial within the meaning of due process of law. *The appellant was sufficiently identified as the person who committed the robbery by witnesses who did not attend the lineup and in addition, it was not shown that the*

> *witnesses who may have attended the lineup identified appellant as a result thereof.* There is nothing in the record which indicates or suggests that appellant was mistakenly identified because of the lineup." (emphasis supplied)

These assertions of the court would presumably establish that the in-court identification of petitioner as the robber had an independent source. Yet at trial no mention was even made of line-up procedures, and it cannot be ascertained from the record who of the identifying witnesses viewed petitioner at line-up and who did not.

Thus, by virtue of the foregoing, it would appear the Court of Appeals has erroneously decided an important question of law which has not been, but should be, settled by this court, i.e. whether despite the ruling of the Court that *Wade, Stovall* and *Gilbert* are *not* to be applied *retroactively*, critical stages of the proceedings against defendant must be considered as part of the entire case made out against him and in the context of all such proceedings be deemed to have conformed to concepts of due process of law and fair trial as required by the Constitution. Or it may be said alternatively that a federal question has been decided in a way in conflict with the decisions mentioned of this court. In any event only this court can clear up the lack of precision with which the court below dispensed of the arguments of petitioner.

II

THE COURT BELOW DID NOT SUFFICIENTLY DEAL WITH PETITIONER'S CONTENTION THAT THE PRESENTATION OF EVIDENCE AND TESTIMONY ON BEHALF OF PETITIONER AT TRIAL WAS SO INADEQUATE AS TO CONSTITUTE DENIAL OF A FAIR TRIAL AND EFFECTIVE COUNSEL.

The other issue raised by petitioner in his appeal was failure of counsel adequately to present his cause, his defense, to such an extent that he was in effect denied his right to a fair trial and effective counsel.

Again the thrust of petitioner's complaint in respect of this point was based upon both the Reporter's Transcript of the trial and uncontested affidavits submitted by him in support of his motion for new trial. In the totality of the circumstances thus presented it is petitioner's contention that upon this point as well he was denied a fair trial.

It may be true that the failure to question identifying witnesses concerning their prior identification at lineup resulted from a dilemma and confusion faced by counsel that in effect was resolved only after trial, by *Wade*, *Gilbert* and *Stovall*. Yet petitioner had anticipated, counted upon, a presentation of testimony and evidence concerning the pattern of conduct of his activities on every Wednesday of the week and on the particular Wednesday of the robbery with which he was charged. He was lame that day, but no mention was made of this by identifying witnesses, nor was the fact brought out on cross-examina-

tion. This fact could have been collaborated by several witnesses on behalf of petitioner. In the course of his business, as he was going through his normal Wednesday routine, petitioner met and talked with numerous persons, both before and after the robbery, who could have testified concerning his attitude, emotions and state of mind — all of which may have had effect as to appellant's possible motive or lack thereof for commission of the crime.

The significance of the failure to call these witnesses may readily be seen from certain statements of the prosecutor in his closing argument, wherein he remarked in a challenging manner upon the absence of such witnesses (241).

Traditionally, the law upon this subject has in summary been that to warrant reversal of a conviction, the defendant must make a showing that in effect no defense at all was offered in his behalf. Anno., 24 A.L.R. 1025, 64 A.L.R. 436. However, it is submitted that in this field of law, as in most, changing times make for changing concepts. A recent California case is perhaps symptomatic of this trend: *People v. Welborn,* 257 C.A.2d 513, 65 Cal.Rptr. 8 (1968). There the defendant pleaded not guilty and not guilty by reason of insanity, to a charge of murder. By stipulation, in which defendant personally joined, the guilt issue was submitted to the court upon the transcript of the preliminary hearing and of a conversation between defendant and the investigating officer. Both sides waived argument. The court found defendant guilty of murder

in the first degree. By stipulation, in which defendant personally joined, the sanity issue was submitted for decision by the court upon the reports of five psychiatrists who had examined the defendant. The court found defendant sane at the time of the homicide and at all times during trial, and sentenced him to life imprisonment.

Defendant there made a motion for new trial which his counsel submitted without argument. The motion was denied. The record before the appellate court was augmented to include the reports of the five physicians who had examined him, and these were considered by the court in its decision.

The California court concluded that the failure of defense counsel to offer in evidence at the guilt phase of the trial the psychiatric evidence that the record shows was available, at the same time neither offering nor arguing any other defense, resulted in a total failure to present the cause of the defendant in any fundamental respect, and thereby deprived him of his constitutional rights to effective aid of counsel. Accordingly the judgment of conviction was reversed. The court took note that the defense of diminished capacity would have been a defense available in the guilt phase of the trial and stated that it was counsel's duty to investigate carefully all defenses of fact or law that may be available to the defendant; and if his failure to do so results in withdrawing a crucial defense from the case, the defendant has not had the assistance to which he is entitled.

The supplemental affidavit of petitioner demonstrated the brief time he was allowed to spend with his trial counsel by way of preparation for trial, his submission to counsel of a five page single-spaced typewritten memorandum detailing the basis for his defense, showing many witnesses who could have testified on his behalf, and that despite all this counsel for petitioner at trial chose only to make cursory examination of petitioner on his own behalf, and to call no other witnesses other than character witnesses, and, briefly, the wife of petitioner.

It is submitted that it is only necessary to point out that for whatever reason, however arrived at, the record reveals petitioner's only defense — his only hope for exoneration, and all the issues raised thereby, were never brought fully to the attention of the court and jury, this to the complete and pardonable surprise of petitioner.

The Court of Appeals for the Ninth Circuit in its Opinion (Appendix, p. 6), refers to the well settled rule that conviction on the ground of ineffective counsel will be granted only in certain circumstances, including those where "the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation". It may be seen from the foregoing that petitioner in fact does contend that the purported representation at trial by counsel was only perfunctory, and without adequate opportunity for conference and preparation. To say as the court below does that witnesses not called by counsel on behalf of petitioner could have testified only concerning his attitude, emotions and state of mind in order to

show possible motive or lack thereof (Opinion of lower court, pg. 4) is really to ignore the full import of petitioner's argument on appeal, and in this Petition for Writ of Certiorari. Petitioner does claim as already stated that his purported representation at trial was perfunctory and without adequate opportunity for conference and preparation, but he does not stand on this point of and by itself. Rather, it is his contention that in the totality of the circumstances, considering the matter of the lineup and considering the extent and adequacy of representation by counsel at trial, he was not granted the fair trial he was entitled to within the meaning of due process of law.

CONCLUSION

For the foregoing reasons, it is submitted, the court should grant this Petition for Writ of Certiorari, the decision of the United States Court of Appeals, Ninth Circuit, should be vacated, and the Court should grant such other and further relief as it deems proper in the circumstances.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM LORIN BORCHERT, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 22,381

[December 31, 1968]

Appeal from the United States District Court for the Central District of California.

Before: JERTBERG and ELY, Circuit Judges, and TAYLOR,* District Judge.

TAYLOR, District Judge:

Appellant has appealed from a judgment of conviction, upon the verdict of a jury, on a one count indictment charging him with robbery of a National Bank in violation of Title 18, United States Code, Section 2113(a).

The specification of error relied on by appellant is that the District Court erred in denying appellant's motion for a new trial upon the ground that he was deprived of a

*Hon. Fred M. Taylor, District Judge, United States District Court, Boise, Idaho, sitting by designation.

fair trial and denied effective aid of counsel within the meaning of constitutional rights afforded him.

The questions presented are (1) whether the totality of the circumstances surrounding the trial deprived appellant of a fair trial within the meaning of due process of law and (2) whether the presentation of evidence and testimony on behalf of appellant was sufficiently adequate so as to constitute a fair trial within the meaning of due process of law.

The appellant was arrested on March 15, 1967, the evening of the robbery, and soon thereafter was placed in a lineup for identification purposes without the benefit of counsel. He contends, with particular reference to the lineup, that he did not receive a fair trial. He asserts that the physical characteristics of the other three persons appearing with him in the lineup were very dissimilar to his. He also claims that he did not intelligently waive his right to having counsel present during the lineup.

In support of his contention, appellant relies on language contained in *United States v. Wade,* 388 U.S. 218, 87 S.Ct. 1926 (1967); *Gilbert v. State of California,* 388 U.S. 263, 87 S.Ct. 1951 (1967); and *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967 (1967). Appellant correctly recognizes that *Stovall,* decided the same date as *Wade* and *Gilbert,* holds that the rule announced in *Wade* shall not be retroactive to lineups held prior to June 12, 1967. He argues that regardless of the holding in *Stovall* the reasoning of the Supreme Court makes the principles announced in all three cases applicable here. He claims that the holding of the lineup colored his entire trial to

the extent that he was denied due process of law. After reviewing the trial record we do not agree.

In *Wade,* supra, it was held that a lineup is a critical stage of the proceedings and that a defendant has a right to have an attorney present at the lineup. *Wade* also held that a defendant is not denied a fair trial if the in-court identification had an independent source, or the introduction of the evidence was harmless error.

In *Stovall,* supra, it is stated that a man may demonstrate that the confrontation conducted was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. Since *Wade* is not applicable here it was incumbent on appellant under *Stovall* to show that he was denied due process of law because of the lineup identification.

It is abundantly clear from the evidence in this case that the identification of appellant was not dependent on the lineup. Furthermore, there is no evidence in the record that demonstrates or indicates that the confrontation was so unnecessarily suggestive and conducive to irreparable mistaken identification so as to deny appellant due process of law.

The appellant was identified as the robber by Mrs. Corey, an employee of the bank, who did not attend the lineup. She was standing near Mrs. Canada, the person robbed, and at the trial positively identified appellant as the robber. Also, the palm print of appellant was "lifted" from Mrs. Canada's teller window in the bank. This evidence in and of itself was sufficient to convict appellant independent of the lineup.

At the trial Marjorie Jones, assistant cashier at the bank, identified the appellant as the man she saw robbing the bank and the person that she and Mrs. Hastie had previously observed outside the bank during their lunch hour. She testified that his activities were so peculiar that she dictated a description of appellant and his car to Mrs. Hastie. Miss Jones was positive that the man she observed outside the bank was the one who later entered the bank and received change from Mrs. Hastie. Miss Jones related that she observed the appellant for approximately forty-five minutes during her lunch hour on the day of the robbery, that he was the man she observed at Mrs. Hastie's window and the one who robbed Mrs. Canada.

Mrs. Hastie identified appellant as the man she and Marjorie Jones observed during their lunch hour. She also testified that she recorded a description of the appellant and his automobile, that he came to her window for change, and about ten minutes later he came through the rear door wearing glasses and a hat and walked towards Marie Canada's window. The victim of the robbery, Mrs. Canada, in identifying appellant stated: "I am just positive it is the man. The whole time I was being robbed I looked right into his face, and there isn't any doubt in my mind." In addition Mr. Kieffer, manager of the bank, and Mr. Zimmerman, assistant cashier, did not identify the appellant at the trial but testified that the robber left the bank and entered the automobile described by other witnesses as the automobile the appellant was seen in prior to the robbery and the one appellant admitted he drove off in.

Appellant admitted doing certain things prior to the robbery as related by Jones and Hastie and admitted that he obtained change from Hastie at a teller window near the front of the bank as stated by Jones and Hastie. He denied being at the window of the teller who was robbed even though his palm print was "lifted" from that window. Appellant admitted that he was in the bank on the day of the robbery but, of course, he did not admit that he was the person who committed the robbery. He does not question the sufficiency of the evidence to prove his guilt.

The trial record clearly shows that in the entire context of the proceedings against appellant, with particular reference to the lineup to which he was subjected, he did receive a fair trial within the meaning of due process of law. The appellant was sufficiently identified as the person who committed the robbery by witnesses who did not attend the lineup and in addition, it was not shown that the witnesses who may have attended the lineup identified appellant as a result thereof. There is nothing in the record which indicates or suggests that appellant was mistakenly identified because of the lineup.

Appellant contends that the presentation of evidence and testimony on his behalf was so inadequate that he was denied a fair trial within the meaning of due process of law. In substance he claims that he was denied the effective assistance of counsel. It is not uncommon for a defendant to find fault with his counsel after he is convicted. Appellant's principal criticism in regard to the adequacy of his trial counsel is that he did not present

more witnesses on his behalf. According to appellant's affidavits these witnesses could have testified to his usual activities on Wednesday and what he did on the day of the robbery which was also Wednesday. He claims these witnesses could have testified concerning his attitude, emotions and state of mind in order to show possible motive or lack thereof for commission of the crime. These witnesses were not to be used to establish an alibi or to show times inconsistent with the case of the prosecution. It is reasonable to believe that at the time trial counsel did not consider the testimony of such witnesses relevant and admissible or for some other reason of no benefit to the defense of appellant. This may or may not have been correct. It has been held many times that hindsight is not the proper measure for determining the adequacy of representation by counsel, and it has been repeatedly held that the Constitution does not guarantee that counsel appointed for, or employed by, a defendant shall measure up to his notions of ability or competency. *Sherman v. United States,* 241 F.2d 329 (9 Cir. 1957). It is a well settled rule that relief from conviction on the ground of incompetent or ineffective counsel will be granted only when the trial was a farce, or a mockery of justice, or was shocking to the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation. *Williams v. Beto,* 354 F.2d 698 (5 Cir. 1965); *Bates v. Wilson,* 385 F.2d 771 (9 Cir. 1967); *Barba-Reyes v. United States,* 387 F.2d 91 (9 Cir. 1967); *Smith v. United States,* 389 F.2d 564 (9 Cir. 1968).

We have carefully examined the record of the trial and believe that trial counsel did a commendable job in representing appellant. The contention of lack of competent counsel at trial is without merit.

The judgment is affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1094

WILLIAM L. BORCHERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–7) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1968. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to March 1, 1969, and the petition was filed on February 28, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's identification as a bank robber was so affected by a pretrial lineup, conducted

prior to this Court's decision in *United States* v. *Wade*, 388 U.S. 218, that he was denied a fair trial.

2. Whether the efforts of petitioner's retained counsel at trial were so inadequate as to result in the denial of effective assistance of counsel.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of bank robbery in violation of 18 U.S.C. 2113(a). On September 11, 1967, he was tentatively given the maximum sentence pending the results of a 90-day study conducted pursuant to 18 U.S.C. 4208(b). His appal was taken before the study was commenced.

The evidence showed that on March 15, 1967, petitioner was observed sitting in his vehicle which was parked in the vicinity of a bank in La Canada, California. His behavior, over a 50-minute period, consisted of writing in some record book, repeatedly putting on and removing a hat and glasses, picking up an attache case, then leaving the car and proceeding toward the back door of the bank (IV R. 12–13, 44, 64).[1] The observers, Miss Jones and Mrs. Hastie, both tellers, made a note of petitioner's appearance and of the number of his car's license tags, NGE 890 (IV R. 16, 27, 28, 35, 45). Shortly thereafter, petitioner entered the bank and obtained change from Mrs. Hastie (IV R. 18, 53). He looked over the bank as he left (IV R. 18, 54). Fifteen minutes later he

[1] "R." refers to the court of appeals record on file with the Clerk of this Court. It consists of five volumes, with the trial transcript being in volumes III, IV, and V.

again entered, this time wearing a hat and glasses (V R. 99, 101). He went to the teller window of a Mrs. Canada, placed an open attache case on her counter, and told her not to sound an alarm but to give him her money (IV R. 81). He obtained $954 from her (V R. 110), and left the bank.

Mrs. Canada testified she was positive petitioner was the robber (IV R. 86). Mrs. Corey, a teller whose station was adjacent to Mrs. Canada's, heard the robber speak, saw him obtain the money, and identified petitioner as the perpetrator of the robbery (V R. 98, 103). The other two tellers, Miss Jones and Mrs. Hastie, identified petitioner as the person they had seen earlier in the parking lot, at Mrs. Hastie's window getting change, and, at the time of the robbery, at Mrs. Canada's window (IV R. 18, 22, 25, 55–56). Two other bank employees saw the robber, whom they did not identify at trial, leave the bank and enter a vehicle with license tag number NGE 890 (V R. 116, 123–124).

When petitioner returned home that evening he was apprehended driving his vehicle with the NGE 890 license tag number (V R. 136). Prior to the robbery petitioner had borrowed money to pay interest on earlier loans and had had some checks dishonored by his bank (V R. 177, 180).

Petitioner, in testifying, acknowledged that on the day of the robbery he had sat in the parking lot in his car, had worn his glasses intermittently as he worked on his accounts,[2] and had gone inside the bank, but

[2] Petitioner was a liquor salesman who travelled a local route calling on customers or making market surveys (V R. 161).

only to obtain change (V R. 169–170). He was certain that he had not obtained change at Mrs. Canada's window (V R. 178–179, 223). Rebuttal evidence showed that shortly after the robbery, latent palm and fingerprints were lifted from the counter of Mrs. Canada's window (V R. 187, 200–201, 222), and that these were identified as those of petitioner (V R. 191, 213).

ARGUMENT

1. Petitioner questions the conduct of a lineup held shortly after he was apprehended (Pet. 11–22), a matter not inquired into at trial (Pet. 6). Petitioner states that he was dressed in the same prison clothes as the other participants in the lineup, and that all were required to wear glasses as they repeated certain phrases. He adds, however, that the others were of a different height, stature, complexion, and age group from petitioner, and that each of the others had a white band on his wrist (Pet. 8). Since the events occurred before this Court's decision in *United States* v. *Wade,* 388 U.S. 218, the absence of counsel is not critical and the identifications would be fatally defective only if they were so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Stovall* v. *Denno,* 388 U.S. 293, 302; *Simmons* v. *United States,* 390 U.S. 377, 384. In this case, the record affirmatively indicates that the identification of petitioner at trial was not the result of an improper lineup. The robbery took place in the afternoon in a well-lighted bank; the robber wore no mask; and numerous employees who had been able to see the robber identified him (see

Simmons, supra, 390 U.S. at 385). Indeed, at least one teller, Mrs. Corey, who positively identified petitioner as the robber, did not attend the lineup; she testified she had not seen petitioner between the time of the incident and the commencement of the trial (V R. 103–105). Moreover, petitioner's fingerprints in the area of the robbery, and the obtaining of his car license tag number immediately after the robbery by two witnesses who did not identify petitioner at trial, both corroborate the identification made and indicate that the lineup was not a significant factor in connecting petitioner to the commission of the crime (see Pet. App. 4–5). As the court below properly concluded, "It is abundantly clear from the evidence in this case that the identification of [petitioner] was not dependent on the lineup" (Pet. App. 3).[3]

2. Petitioner's attack on the competency of his retained counsel (Pet. 23–26) is, as the court below noted, nothing more than a hindsight attempt to suggest different trial strategy (see Pet. App. 5–6). Since petitioner admitted being in the bank at the crucial time, counsel could reasonably believe that it would serve no purpose to call witnesses as to his general mode of operation. The effectiveness of the defense in attacking the ability of Mrs. Canada to remember events and in questioning the powers of observation of the other tellers is indicated by the fact that the

[3] The court of appeals further noted that, at all events, "there is no evidence in the record that demonstrates or indicates that the confrontation was so unnecessarily suggestive and conducive to irreparable mistaken identification so as to deny [petitioner] due process of law" (Pet. App. 3).

jury, after deliberating for a few hours, returned to court and asked that Mrs. Canada's testimony concerning the location of the robber's hands in relation to the attache case be reread (II R. 23–24). That the jury was impressed by the fingerprint evidence, in the face of petitioner's unequivocal statement that he had not been at Mrs. Canada's counter, cannot be regarded as the fault of his counsel.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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